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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

NAVNEET S. CHUGH,

Plaintiff and Appellant,

v.

ROY MCGARRELL & CO. et al.,

Defendants and Respondents.

G027506

(Super. Ct. No. 803084)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John M. Watson, Judge. Affirmed.

Navneet S. Chugh, in pro. per., for Plaintiff and Appellant.

Law Offices of John L. Norman and John L. Norman for Defendants and Respondents.

Navneet S. Chugh appeals from a judgment entered in favor of Roy McGarrell & Co. (McGarrell) after the trial court granted McGarrell's motion for summary judgment. Chugh argues the trial court erroneously granted summary judgment because there was a triable issue of material fact regarding whether a report McGarrell prepared and published was privileged. We find no merit in his contention and affirm.

I

Dr. Tarlochan Singh, chairman of the board of directors of the Sikh Center of Orange County (the Center), retained McGarrell, a certified public accountant (CPA), to review the Center's financial records and prepare a report detailing his findings.¹ Singh was concerned with the Center's financial transactions; he suspected someone had misappropriated funds. Singh provided McGarrell with the Center's financial documents; however, McGarrell asked Singh for additional documents to complete his report. McGarrell contacted Chugh, an attorney and CPA who was previously the Center's in-house bookkeeper, by telephone and letter and asked him for additional documents.² Chugh did not return McGarrell's telephone calls or provide him with the documents he requested.

Singh became impatient, and McGarrell completed the report without the additional documents. In the report, McGarrell stated, Chugh's financial statements were "misleading and inconsistent" because "\$300,000.00 was deposited into [a bank] . . . [but] was not included in the income of [the Center]." He explained, Chugh's accounting

¹ Singh's letter to McGarrell memorializing their agreement says McGarrell was to audit the Center's accounts. Chugh contends McGarrell did not follow "regulations" when he audited the Center. We need not address Chugh's claim because the issue is whether McGarrell's report was privileged.

² Chugh disputes McGarrell asked him for additional documents. In fact, Chugh asserts McGarrell wrote the letters requesting additional documents after Chugh filed his suit. We need not resolve the factual discrepancy because it is irrelevant to the issue of whether McGarrell's report was privileged.

summaries were “incorrect and misleading when compared to the actual bank deposits per the bank statements for the same period. Actual bank deposits for the period . . . are \$506,838.00 greater than that reported by . . . Chugh.” (Bold omitted.) McGarrell concluded the total probable loss to the Center, based on Chugh’s and other accountants’ summaries, was \$1,214,118.03.

Before McGarrell sent the report to Singh, he informed him it was a preliminary report and he would need additional documents to complete it. McGarrell faxed Singh the report with a cover letter, which stated “for [your] eyes only.” McGarrell also told Singh not to publicly disseminate the report until he received additional documents and completed the report.³

After Chugh received a copy of the report, he asked McGarrell to retract it. McGarrell initially defaulted, but after his default was set aside, he answered and then filed a motion for summary judgment on the grounds of privilege. Chugh opposed the motion. Approximately two weeks later, he filed additional declarations contending McGarrell prepared false letters in preparation for the motion for summary judgment. The court granted McGarrell’s motion for summary judgment.

II

A “motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence” (Code Civ. Proc., § 437c, subd. (c).) “A defendant . . . has met his or her

³ Chugh disputes McGarrell sent the cover letter when he transmitted the report. He contends McGarrell wrote the cover letter after he transmitted the report in preparation for his motion for summary judgment. We need not resolve the factual dispute because, as we explain below, the issue is whether McGarrell’s report was privileged.

burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar*, at p. 850, fn. omitted.)

We review the trial court’s granting of a summary judgment de novo. (*Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 821.) The moving party’s affidavits should be strictly construed and the opponent’s affidavits liberally construed. (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355.) “[A]ny doubts about the propriety of granting the motion must be resolved in favor of the party opposing the motion. [Citations.]” (*Ibid.*)

Civil Code section 47, subdivision (c) defines one type of qualified privilege referred to as the common-interest privilege. The qualified privilege applies if the communication is made, without malice, to a person interested, by one who is requested by the person interested to give the information. (Civ. Code, § 47, subd. (c)(3).) The defendant may lose the privilege if the statement “““was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the [statement] and therefore acted in reckless disregard of the plaintiff’s rights” [Citations.]’ [Citation.]” (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 217, original italics.) Further, the privilege may be abused by publication to persons who do not have a

common interest or publication of statements which have no bearing upon the interest sought to be protected. (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846.) “The interpretation of [Civil Code] section 47, subdivision [(c)] is a pure question of law which we [must] review independently.” (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1139-1140.)

McGarrell, as the party moving for summary judgment, had the burden to establish his report was protected by the common-interest privilege. Therefore, he had to show that Singh asked him to prepare the report and Singh was interested in the report’s subject matter. With his motion for summary judgment, McGarrell included his affidavit, which stated Singh, the Center’s chairman of the board of directors, retained him to review the Center’s financial records.

Chugh conceded Singh asked McGarrell to prepare the report. He stated, “It is obvious that [McGarrell’s] [r]eport was prepared on the basis of [Singh’s] letter”⁴ As McGarrell correctly argued, a director of a corporation has an interest in its financial affairs. (See *Swaffield v. Universal Ecsco Corp.* (1969) 271 Cal.App.2d 147, 163; Corp. Code, § 9142, subd. (a)(3) [director may bring action for damages for breach of trust]; Corp. Code, § 9241, subd. (a) [director has duty to act in best interests of corporation].)

However, Chugh disputed the claim Singh was an interested party. He maintained Singh “was not the Chairman during the whole of the period when [Chugh] did the [Center’s] bookkeeping” He also opined, “As a member of the Board of Directors, he should be interested as such and not as an individual, whereas in discovery

⁴ In his separate statement of material facts, Chugh disputes McGarrell’s claim Singh asked McGarrell to limit his review of the Center’s financial records to the specific areas Singh requested. Chugh stated McGarrell was to prepare an audit. This is a distinction without a difference. The only issue is whether Singh retained McGarrell to prepare the report; Chugh conceded he did.

McGarrell has admitted that he was not appointed by the Board of Directors. As an ordinary interested person he does not get any special status, right or privilege.”

Chugh overlooks the undisputed fact Singh was the director when he retained McGarrell and McGarrell sent him his report. And, as stated above, a director has an interest in the corporation’s affairs and may act on its behalf. Therefore, there was no material issue of fact as to whether the common-interest privilege applied to McGarrell’s report. However, we must address whether McGarrell abused the privilege.

The defendant may lose the privilege if the statement was motivated by malice. (*Frommoethelydo v. Fire Ins. Exchange, supra*, 42 Cal.3d at p. 217.) McGarrell stated he did not act with malice when he prepared and published his report. In his declaration, he explained Singh asked him to review the Center’s financial records, and he reviewed the records that were made available to him. He “rendered [his] preliminary opinions . . . accurately reflecting what [his] review of the documents had revealed.” He concluded, “At no time did [he] attempt to or otherwise intend to injure or otherwise harm . . . Chugh.”

In his opposition, Chugh disputed McGarrell’s assertion he did not act with malice. He explained, “Malice is not the only standard required to prove defamation, particularly, defamation *per se*.” True, libel *per se* is a publication which is defamatory on its face (Civ. Code, § 45a) and is false and unprivileged. (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 797.) However, whether a publication is defamatory and whether it is privileged are two separate inquiries. If privileged, recovery is barred regardless of whether the publication was libel or libel *per se*. (*Snively v. Record Publishing Co.* (1921) 185 Cal. 565, 574 disapproved on other grounds in *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1208-1211 and *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 731-733.)

Regardless of whether Chugh asserts McGarrell’s report was libel or libel *per se*, he was still required to include facts which suggested McGarrell’s statements were

motivated by hatred or ill will towards him or by showing McGarrell lacked reasonable grounds for belief in the truth of his statements. Chugh failed to include any such facts. Under the common-interest privilege, malice will not be inferred from the communication. (Civ. Code, § 48; see *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1209-1210 [under common-interest privilege no malice implied]; *Locke v. Mitchell* (1936) 7 Cal.2d 599, 602 [same].) Chugh's failure to include any factual support was grounds for granting McGarrell's motion for summary judgment on the issue of malice. (Code Civ. Proc., § 437c, subd. (b) [each disputed material fact shall be followed by a reference to supporting evidence].)

The defendant may also lose the privilege if the statement was made to persons who do not have a common interest. (*Deaile v. General Telephone Co. of California, supra*, 40 Cal.App.3d at p. 846.) McGarrell, in his declaration, contended he sent the report to Singh and to "no other person."

Chugh, in his opposition, stated Singh and Dr. Jasbir Mann were republishing McGarrell's report "on a daily basis and mailing, faxing and fedexing [*sic*] [his report] to as many people as they can." With his additional declaration filed after his opposition, Chugh included a letter Singh sent to McGarrell. Singh told McGarrell there was a board meeting the previous day, and "Mr. [P.S.] Dargan [a]lso presented his views about [a]ccounting done by . . . Singh and [McGarrell's] report."⁵

Although there is a dispute as to whether McGarrell included the cover sheet which read "for your eyes only," Chugh did not include any facts to suggest McGarrell sent the report to anyone other than Singh. In any event, he admits in his

⁵ In his complaint and opening brief, Chugh claimed McGarrell's report "has been further republished to members of the [Center's board of directors] and also to other patrons of the . . . Center and, [Chugh] has reasons to believe, was seen and read by at least the following persons in California" Chugh listed 16 people who had read McGarrell's report. He concluded by saying, "Many more persons, beyond this list, have seen and read the Report or part of it."

complaint and opening brief that the persons who saw the report were interested parties covered by the privilege. Specifically, he asserts the report had been republished to the Center's board of directors and also to the Center's patrons. As stated above, directors have a common interest in the corporation. Moreover, "[T]he common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest. [Citations.]" (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 796-797.) Chugh offered no facts to suggest McGarrell or Singh republished the report to anyone without a common interest.

The judgment is affirmed. McGarrell shall recover his costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.